89-206

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MEBA PENSION TRUST, *et al.*,
Petitioners

v.

JUAN RODRIGUEZ, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Notwithstanding § 514(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), may a district court assert jurisdiction under ERISA and apply ERISA's substantive standards to adjudicate a claim based on a post-ERISA denial of benefits, where that claim is the inevitable consequence of an act or omission which occurred before the effective date of ERISA?

2. May a court sustain a claim for benefits under ERISA where the validity of that claim (asserted within the statute of limitations period) necessarily depends on a determination that an act or omission *outside the limitations period* was illegal?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 872 F.2d 69, and is reprinted at pp. 1-11 of the Appendix ("A"). The unreported opinion of the District Court is reprinted at A. 13-24.

JURISDICTION

The District Court's jurisdiction was asserted under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(a). The judgment of the Court of Appeals was entered on April 7, 1989. A. 12. On June 16, 1989, Chief Justice Rehnquist extended the time for filing this petition to and including August 5, 1989. A. 25. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 897, as amended, § 514(b)(1), 29 U.S.C. § 1144(b)(1), which provides in pertinent part:

> § 514 EFFECT ON OTHER LAWS
>
> (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(b). This section shall take effect on January 1, 1975.
>
> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

STATEMENT OF THE CASE

Juan Rodriguez is a retired marine engineer.[1] His complaint below, grounded exclusively on the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, ("ERISA," "the Act"), alleged that the MEBA Pension Trust ("Trust") improperly denied him pension credit for post-retirement service. The District Court granted summary judgment for the Trust, concluding that, because the acts and omissions underlying the complaint took place prior to the effective date of ERISA, § 514(b)(1) of that statute, 29 U.S.C. § 1144(b)(1), precluded plaintiffs' claim under ERISA. Alternatively, the District Court concluded that the Trust's denial did not violate ERISA. The Court of Appeals reversed, concluding that ERISA applied and that the Trust's action was inconsistent with the terms of that statute.

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[1] Juan Rodriguez' wife, Maria Rodriguez, was also a named plaintiff and claims a survivorship interest in her husband's pension. Except as otherwise noted, all references are to Mr. Rodriguez.

A. Rodriguez and The Port Engineer Option

The undisputed evidentiary findings of the District Court, which the Court of Appeals did not disturb, are as follows. The Trust is a nationwide, multi-employer pension plan governed by a Board of Trustees, one-half of whom are appointed by the contributing employers and one-half of whom are appointed by District No. 1, MEBA/NMU ("MEBA"), a labor organization representing licensed seamen.

Juan Rodriguez joined MEBA as a marine engineer in 1944. In 1965, he retired from covered employment, applied for and was granted a monthly pension in the amount of $300.00 per month. He has continued to receive monthly benefits from the Trust and currently receives a pension of $390.66 per month. At the time of the proceedings in the District Court, the Trust had paid more than $95,000 in benefits to Rodriguez. A. 14.

In 1967, after his retirement, Rodriguez began employment with Sea-Land Service, Inc. ("Sea-Land") as a port engineer, a position that was not then covered by an MEBA collective bargaining agreement and therefore was not covered employment for purposes of the Trust. On June 16, 1968, however, Sea-Land entered into a collective bargaining agreement with MEBA covering its port engineers, and Rodriguez thereby again came into covered employment. A. 14.

Under the then-existing Trust regulations, a retiree such as Rodriguez was prohibited from receiving pension benefits while working in covered employment. On October 16, 1968, however, the Trust Regulations were amended so that retirees who were working as port engineers at the time these employees were organized by MEBA were given an option ("the Port Engineer Option") of (1) suspending their receipt of pension payments and accruing further pension credit or (2) con-

tinuing to receive a pension but foregoing further accrual of credit. A. 14.

Notice of the Port Engineer Option was sent to affected beneficiaries by letter dated November 25, 1969, which called for a written response to indicate their election under the option. Rodriguez never received notice of this option. *Id.*[2] The Trust did not receive a response from Rodriguez and several other port engineers; it therefore assumed that these participants desired to continue the *status quo*, *i.e.*, to continue to receive monthly pension benefits, and forego additional credit.

By letter dated December 18, 1972, Rodriguez wrote the Trust inquiring whether he was accruing additional pension credit for his service as a port engineer. The then Trust Administrator, Mildred E. Killough, responded by letter dated March 1, 1973. This letter quoted provisions of the Trust regulations containing the Port Engineer Option and went on to explain:

> This means that [on] June 16, 1968, you could have elected to have your pension benefits suspended in which case you could have accrued additional credits. *Since you did not so elect, you continued to receive pension benefits and, accordingly, you could accrue no further credits.*

A. 15 (emphasis added). A copy of the Trust Agreement, which included the text of the Port Engineer Option, was also sent with this letter to Rodriguez. *Id.*

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[2] More accurately, Rodriguez asserted he did not receive notice of the Port Engineer Option in 1969 and the Trust was unable to either corroborate or refute his denial. Accordingly, in ruling on his claim, the Trustees gave him the benefit of the doubt and assumed that his assertion was correct. Because the law is clear that review of benefit determinations under ERISA must be on the record before the Trustees, *see e.g.*, *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985); *Wolf* v. *J.C. Penney Co.*, 710 F.2d 388, 394 (7th Cir. 1983), the Trust did not dispute Rodriguez' assertion in this litigation.

For the next twelve years Rodriguez continued to receive pension benefits and corresponded with the Trust on several occasions. Nonetheless, he did not question or challenge the Trust's 1973 decision that he was ineligible to accrue additional credit. *Id.* On January 25, 1985, shortly before his mandatory retirement, he filed an application for an enhanced pension based on his pre-retirement service as well as his subsequent service as a port engineer. A. 15-16. On February 26, 1985, Frederick Jackson, Trust Manager, responded that additional benefits were not available to Rodriguez because he failed to suspend pension payments under the Port Engineer Option. A. 15.

Mr. Rodriguez then, through his attorneys, requested and received formal review of his denial of benefits. The Trust reviewed Rodriguez' requests for additional pension credit and lump sum distribution and denied them on the ground that he had failed to suspend his pension payments under the Port Engineer Option. A. 16. The final decision of the Trustees was communicated to Rodriguez by letter dated March 3, 1986.

B. Proceedings in the District Court

Rodriguez filed suit on December 27, 1987. His complaint, grounded solely on ERISA, alleged that the Trust's action (1) was contrary to the terms of the Trust regulations, (2) was violative of ERISA because he had not received notice in 1969 of the Port Engineer Option, and (3) was unreasonably discriminatory because in the 1970s the Trust had permitted two other port engineers (who were, according to Rodriguez, similarly situated) to exercise the Port Engineer Option retroactively.

Following discovery, the parties filed cross-motions for summary judgment. After hearing argument on the motions, the District Court granted summary judgment in favor of the Trust concluding that the "acts or omissions clause" of ERISA § 514(b)(1) bars Rodriguez'

ERISA claim because the critical acts and omissions underlying the claim—the failure on the part of the Trust to give Rodriguez notice of the Port Engineer Option in 1969 and the 1973 Killough letter denying his request for additional benefits—occurred prior to ERISA's January 1, 1975 effective date.[3] A. 19.

Alternatively, the District Court rejected Rodriguez' claims on the merits. It held that the Trust's decision to not permit Rodriguez to make a retroactive election to suspend pension benefits was reasonable in light of Rodriguez' failure to take any action to protest the Trust's 1973 decision for twelve years. A. 21-22. Moreover, the District Court concluded that Rodriguez' prolonged inaction provided a reasonable basis for the Trustees to distinguish Rodriguez from the two individuals who had been permitted to make a retroactive election in the 1970s because these individuals had made their request for relief immediately upon learning of the option and while they were still working; they, unlike Rodriguez, therefore assumed the risk that they would not work or live long enough to ensure that their gain from future accrual of benefits would exceed their loss in current income.[4] A. 22-23.

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[3] Although the complaint did not state a claim under state law, Rodriguez asserted at the summary judgment hearing that the Trust's action violated the common law of Maryland as well as ERISA. The District Court treated the complaint as so amended and held that under Maryland law, Rodriguez' cause of action arose in 1973 when he was informed that he could not accrue additional credit. A. 19-20. Accordingly, the District Court concluded that any state law claim was barred by Maryland's three year limitations period for breach of contract. A. 20-21.

[4] Two of these individuals—Pedro Castano and Leonidas Boyd—made requests for a retroactive election in 1975 and 1976 respectively, a decade before Rodriguez, and, in both cases, the individuals were not contemplating retirement (A. 22). Although Rodriguez claims that he initially did not know that these other port engineers were similarly situated, he admitted that an MEBA official told him in the late 1970s that Mr. Castano had been given an opportunity

C. The Court of Appeals' Opinion

The Court of Appeals reversed. It agreed with the District Court that Rodriguez' cause of action accrued in 1986 upon formal denial of his benefit claim, but disagreed with the conclusion that the "acts or omissions" clause of § 514(b)(1) barred the ERISA claim. On the latter point, the Fourth Circuit acknowledged that the circuits were split:

> Among the circuits to consider this issue, two competing views have evolved. The Third Circuit regards the trustees' act in denying a pension application as an act or omission which is subject to ERISA. *Tanzillo*, 769 F.2d at 144. *See also*, *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230, 1234 (7th Cir 1982) (denial of pension benefits post-ERISA was sufficient to invoke ERISA, even through the employee had retired years before ERISA); *Reiherzer* v. *Shannon*, 581 F.2d 1266, 1268-69 (7th Cir. 1978). By contrast, the First and Ninth Circuits have held that if the trustees' denial is the "inevitable result of unequivocal pre-effective date interpretations" of the plan, then the denial is not reviewable. *Menhorn*, 738 F.2d at 1501; *Quinn*, 639 F.2d at 841.

A. 6. In agreement with the Third Circuit, the Court of Appeals held that ERISA applies whenever a pension application is submitted and denied post-ERISA, regardless of whether the principal acts or omissions challenged occurred pre-ERISA or post-ERISA. *Id.* It therefore determined that the statute of limitations did not begin to run until the formal denial of benefits in 1986, and held that the action was not time barred. A. 7 n. 1.

Turning to the merits, the Fourth Circuit applied ERISA's substantive standards to the Trust's pre-ERISA

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to suspend benefits retroactively and accrue additional credit. A. 15. The District Court therefore concluded that the notice of the option provided to Rodriguez in the Killough letter was "reinforced when he was advised about [this] fellow employee's election at a subsequent time." A. 20-21.

conduct and concluded that the Trust "fail[ed] to adequately notify plaintiff of his option and that plaintiff must now be afforded the opportunity to exercise it." A. 7. The Court of Appeals did not address Rodriguez' discrimination claim, his claim that the Trust's action violated the Trust regulations, or his attempt to raise a claim under state law. Instead, its conclusion rests squarely and solely on its view that ERISA's notice requirements applied retroactively and the Trust's 1969 and 1973 omissions violated those requirements. A. 9-11.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT FEDERAL COURTS HAVE JURISDICTION TO JUDGE PRE-ERISA CONDUCT UNDER THE STANDARDS ESTABLISHED BY ERISA IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

A. The Fourth Circuit's Holding Is In Direct Conflict With Decisions Of The First And Ninth Circuits And Is Contrary To The Clear Language Of The Statute

1. As the Fourth Circuit acknowledged (see *supra* at p. 7), the First and the Ninth Circuits have squarely held that where the critical acts giving rise to a plaintiff's claim for benefits occurred before the effective date of ERISA, § 514(b)(1) bars ERISA jurisdiction and the application of ERISA standards for adjudicating that claim. *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Quinn* v. *County Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981). These courts reason that "[t]he clear practical import of the act or omission clause is to prevent past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to

the ERISA effective date that give rise to what is, technically, an independent 'cause of action.'" *Quinn*, 639 F.2d at 841. Thus, in the First and Ninth Circuits, ERISA does not apply "where a claimant is formally denied benefits after ERISA's effective date pursuant to an unambiguous and nondiscretionary plan provision adopted before the effective date [of ERISA]," or "*where a post-effective date formal denial is the inevitable result of unequivocal pre-effective date interpretations of or exercises of discretion under the plan.*" *Menhorn*, 738 F.2d at 1501 (emphasis added). In such circumstances, state law, not ERISA, governs the underlying pre-ERISA conduct and, absent diversity of citizenship, the federal courts lack subject matter jurisdiction over such claims. *Menhorn*, 738 F.2d at 1502-04; *Quinn*, 639 F.2d at 841.

The Third Circuit, and now the Fourth Circuit, disagree with this interpretation of § 514(b)(1). Both view a post-ERISA denial of benefits as itself an act or omission subject to ERISA jurisdiction, even if the claim depends on pre-ERISA acts or omissions: "[w]hile a claim determination may require the plan's trustees to consider pre-ERISA acts, the act of denying a pension post-ERISA will *invariably* involve a 'contemporaneous construction of the plan's provisions . . . to which ERISA's fiduciary standards apply.'" A. 6 (emphasis added), quoting *Tanzillo* v. *Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985). These circuits also view ERISA's substantive standards as applicable to the underlying pre-ERISA conduct in such cases. Thus, in *Tanzillo*, the Third Circuit applied ERISA's break-in-service provisions to the pre-ERISA period to determine whether a break-in-service occurred, 769 F.2d at 145-47,[5] and in the instant case, the Court of Appeals applied the disclosure require-

[5] In a case decided shortly before *Tanzillo*, the Third Circuit applied state law to pre-ERISA conduct. In *Jameson* v. *Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985), that court ruled, as in *Tanzillo*, that ERISA jurisdiction always exists in a

ments of ERISA[6] to determine that the Trust violated ERISA by failing to give Rodriguez adequate notice of the Port Engineer Option in 1969. A. 9-11.

2. The lower court's retroactive application of ERISA is not only contrary to the holdings of two other circuits, it also contravenes § 514(b)(1), which expressly provides that state law shall "apply with respect to * * * any act or omission which occurred before January 1, 1975." Moreover, it is well-settled that statutes should not be applied retroactively "unless their language requires this result." *Bowen* v. *Georgetown University Hospital*, —— U.S. ——, 109 S. Ct. 468, 471 (1988). *Accord*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79-80 (1982); *Greene* v. *United States*, 376 U.S. 149, 160 (1964). Here, this language *precludes* retroactivity.[7] *See also United Airlines* v. *Evans*, 431 U.S. 553, 558 (1977), quoted at p. 16, *infra*, which embodies the implicit understanding that conduct which occurred prior to an enactment is without legal consequences under that enactment.

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case involving a post-ERISA denial of benefits, but, unlike *Tanzillo*, held also that the pre-ERISA acts in such claims are governed by state law, not ERISA's substantive standards. 765 F.2d at 52.

[6] The Court of Appeals relies on ERISA §§ 2(b), 102(a)(1) and 104(b)(1), 29 U.S.C. §§ 1001(b), 1022(a)(1) and 1024(a)(1), which, *inter alia*, require the disclosure of material modifications to a plan or other financial information. A. 8-9. The court also cites numerous cases applying these ERISA disclosure standards. A. 9.

[7] This clear statutory language is buttressed by the legislative history. The Conference Committee report states in pertinent part: "The preemption provision will take effect on January 1, 1975 . . . . However, it will not affect any causes of action that have arisen before January 1, 1975, *and it will not affect any act or omission which occurred before that date.*" H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. 383 (1974), *reprinted in Legislative History*, U.S. Code Cong. & Admin. News, 1974, p. 5162 (emphasis added).

3. It is all too clear that the Court of Appeals, contrary to the First and Ninth Circuits, has applied ERISA standards to the Trust's pre-ERISA acts and omissions. But the opinion introduces further uncertainty by its extended discussion of § 302(c)(5) of the Taft-Hartley Act and the fiduciary standards which apply to plan trustees under that statute. A. 8. It may be that the lower court merely used its perception of the fiduciary standards under § 302(c)(5) as an aid to interpret the standards governing fiduciaries under ERISA, which were deemed applicable to the pre-ERISA act or omission under that court's interpretation of § 514(b)(1). The opinion, however, can also be read to hold that while ERISA supplies the jurisdictional predicate, the substantive standards which govern pre-ERISA activity are supplied by § 302(c)(5) and those standards were violated. If so, review is required additionally because this interpretation of § 302(c)(5) resolves an issue expressly left open by this Court and directly contradicts the holdings of a majority of circuits that § 302(c)(5) is not violated unless a "structural defect" is shown.

In *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573, n. 12 (1982), this Court said: "In *NLRB* v. *Amax Coal Co.*, *supra*, at 330, the Court held that in enacting § 302(c)(5) 'Congress intended to impose on trustees traditional fiduciary duties.' The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties." The Court thereby expressly reserved the question which the court below assumed had been decided in *Amax*, 453 U.S. 322, 330 (1981). A. 8. The question reserved in *Robinson* would take on enormous importance if, as the court below held, ERISA can be applied to pre-ERISA conduct, and if, as that court may also have determined, ERISA standards are to be applied through § 302(c)(5).[8] *Id.*

[8] The Fourth Circuit's suggestion that Congress did nothing more than codify the law of § 302(c)(5) when it enacted ERISA (A. 8)

Moreover, by invoking § 302(c)(5), despite the fact that Rodriguez did not plead, nor offer proof of, a structural defect in Trust regulations or administration, the lower court acted in direct contravention of the rule followed by a majority of circuits. That rule requires a plaintiff to prove a systemic, structural defect in plan regulations or administration in order to state a cause of action under § 302(c)(5); an individual benefit denial based on the day-to-day application or misapplication of plan regulations is not reviewable. *See, e.g., Reiherzer* v. *Shannon*, 581 F.2d 1266, 1270 (7th Cir. 1978); *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 412-13 (2d Cir. 1977); *Bowers* v. *Moreno*, 520 F.2d 843, 846 (1st Cir. 1975). *But see Music* v. *Western Conference Pension*

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is belied by even the most cursory examination of that statute and its legislative history. ERISA was a major change from § 302(c)(5) in both scope and substance. In describing the necessity for ERISA, the Congress contrasted its provisions to those of § 302: "[§ 302] is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct." *Legislative History*, H.R. Rep. No. 93-533, U.S. Code Cong. & Admin. News, 1974, p. 4642. *See also*, Senate Report No. 93-127, U.S. Code Cong. & Admin. News, 1974, pp. 4841, 4847, 4863, 4865. In particular, ERISA's disclosure requirements are significantly more rigorous than those required by previous law (including those under § 302(c)(5)), which were deemed inadequate: "Title I [disclosure and fiduciary standards] represents a major departure from current law." *Legislative History*, H.R. Rep. No. 93-533, U.S. Code Cong. & Admin. News, 1974, pp. 4648-49. Undoubtedly, the adoption of these types of new, more stringent requirements was a major impetus for Congress to enact § 514(b)(1) and the other effective date provisions to make clear that it did not intend pre-ERISA conduct to be judged retrospectively by ERISA's standards. In fact, Congress enacted these effective date provisions and transition rules to enable plan fiduciaries to adjust their procedures to the new requirements of the Act. *See, e.g.*, §§ 111, 211, 307, 414, 1017, 4402, 29 U.S.C. §§ 1031, 1061, 1086, 1114, 1017, 1461. *See also* H.R. Conf. Rep. No. 93-1280, U.S. Code Cong. & Admin. News, 1974, p. 5105; Senate Report No. 93-127, U.S. Code Cong. & Admin. News, 1974, p. 4872.

Trust Fund, 712 F.2d 413, 417 (9th Cir. 1983) (if trustees arbitrarily and capriciously deny participant benefits, a structural defect exists).

B. The Court Of Appeals' Holding Will Result In Inconsistent Decisions And Cause Confusion Among Plan Fiduciaries To The Detriment Of Sound Actuarial Planning

The conflicting positions among the circuits concerning the application of the acts and omissions clause of § 514(b)(1) will cause different substantive standards (*i.e.*, ERISA or state law) to be applied in the different circuits. Thus, the fortuity of where a suit is filed will determine the outcome of a benefits claim.[9] Needless to say, the resulting confusion will create a continuing dilemma for plan fiduciaries, because they will be uncertain of the legal standard which applies to benefit claims and therefore will be unable to make reasoned judgments concerning the validity of such claims.

Moreover, the split in the circuits will continue to have a significant impact for many years to come. As of May 1989, there were approximately 46 million working Americans between the ages of forty and sixty-four. *Employment and Earnings*, U.S. Department of Labor, Bureau of Labor Statistics, Table A-4, p. 26 (June 1989). Almost half of those actively working in the private sector as of April 1972 participated in pension plans. E. Andrews, *The Changing Profile of Pensions in America*, pp. 20-21 (Employee Benefit Research Institute 1985). Therefore, for at least the next twenty years, millions of workers who were participating in pension plans for a sig-

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[9] For example, there can be no doubt that had Rodriguez brought suit in the First Circuit, that court's precedent would have required dismissal of his ERISA claim because "as plaintiff's basic quarrel is with a policy and course of conduct instituted, fully delineated and communicated to him many years prior to 1975, state law is controlling." *Quinn*, 639 F.2d at 841.

nificant period of time prior to the effective date of ERISA will be applying for benefits. The pension entitlements of these beneficiaries may be affected by a wide variety of pre-ERISA acts or omissions.

Even were there not a split in the circuits, the lower court's decision would leave plan fiduciaries subject to stale claims. Under the Court of Appeals' holding, a participant who is formally denied benefits in 1995 could bring an ERISA action on the basis of events which occurred in 1973. That rule makes it difficult, if not impossible, for plan fiduciaries to adequately fund pension plans because a pension fiduciary must know the extent of the plan's obligations in order to make sound actuarial projections.

The instant case is a prime example of the type of problem created by the lower court's approach. In 1973, the Trust informed Rodriguez that he was not accruing additional benefits. He knew then that he had not received prior notice of the election. Yet, he did not challenge the Trust's decision until 1985 [10] when it was too late for the Trust to fund the enhanced benefits he sought, and when it was clear that he could only benefit (and the Trust could only lose) by a retroactive change in his election. By applying ERISA retroactively, the Fourth Circuit has created an immediate liability for the Trust which was not funded because it was wholly unforeseen. By contrast, the District Court's approach (and that followed by the First and Ninth Circuits) protects the integrity of pension plans by requiring beneficiaries to bring their claims promptly under state law.

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[10] Had Rodriguez brought suit immediately, he would have had no choice but to rely on state law because ERISA did not exist.

II. THE HOLDING BELOW THAT THIS SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS COMPOUNDS THE ADVERSE EFFECTS OF ITS INTERPRETATION OF ERISA AND IS CONTRARY TO A SERIES OF DECISIONS IN THIS COURT

A. The adverse consequences of the Court of Appeals' holding that a post-ERISA denial of benefits is actionable under ERISA standards even though it depends on pre-ERISA acts or omissions would be mitigated if the statute of limitations begins to run at the time of the challenged act or omission. Instead, the Court of Appeals held also that the statute of limitations did not begin to run until the Trust's last denial of benefits to Rodriguez, twelve years after he received notice of his status under the Plan. But the decision below is irreconcilable with a series of decisions of this Court which have consistently rejected the theory that an otherwise stale claim based on a time-barred violation can be revived as a result of that violation's subsequent consequences within the limitations period. These decisions were reaffirmed as recently as June of this year, after the court below denied rehearing herein. *Lorance* v. *AT&T Technologies, Inc.*, —— U.S. ——, 109 S. Ct. 2261 (June 12, 1989), following *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980); *United Air Lines* v. *Evans*, 431 U.S. 553 (1977); *Machinists* v. *National Labor Relations Board*, 362 U.S. 411 (1960).

The leading case is *Machinists*, where this Court (per Harlan, J.) held that an unfair labor practice charge against the *enforcement* of a union security provision in a collective bargaining agreement within the limitations period was time-barred, because that charge depended on the allegation that the agreement had been illegally *adopted* outside the limitations period. The Court held that "where a complaint based upon [an] earlier event is time-barred, to permit that event itself ["to cloak

with illegality that which was otherwise lawful"] in effect results in reviving a legally defunct [complaint]." 362 U.S. at 417.

In *Ricks*, the Court held that a college professor's Title VII and § 1981 Civil Rights Act claims alleging discrimination were time-barred because the statute of limitations for both claims began to run upon the college's alleged discriminatory denial of tenure, not the professor's subsequent termination a year later pursuant to a "terminal" contract of employment. The Court held that Ricks' termination of employment was the "delayed but inevitable consequence of the denial of tenure" and that, as a result, "the limitations period commenced at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. Accordingly, the Court found that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.*

In *Evans*, the Court held that a 1973 Title VII claim for discriminatory treatment in the calculation of seniority, which was based on an employee's past discriminatory dismissal in 1968, was time-barred because the statute of limitations for the 1968 dismissal had expired. The Court reasoned:

> *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.* It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558 (emphasis added). The court therefore held that a subsequent challenge of the employee's calculation of seniority credit "may not be predicated on the mere fact that a past event which has no legal significance has affected the calculation of seniority credit,

even if the past event might at one time have justified a valid claim against the employer." *Id.* at 560.

B. Although the present case arises under ERISA, the series of decisions from *Machinists* through *Lorance* applies with equal force herein. For, the effect of the holding below is to permit litigation of the legality of conduct long after it has occurred—here at least twelve years. As this Court explained in *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979):

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence, *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. [Citations omitted.]

The present case exemplifies the importance of an effective statute of repose in ERISA litigation. Respondent's entire position is dependent on his assertion that he did not receive notice of his option in 1969, over fifteen years before he made his claim to the Trust and even longer before he brought suit. If the Trustees had chosen not to credit respondent's denial that he had received notice—as they had every right to do—the district court would have been called upon to decide whether he had done so after "evidence has been lost, memories abated, and witnesses have disappeared." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974),

quoting *Railroad Telegraphers, supra*, 321 U.S. at 349. Under the Fourth Circuit's limitation decision, the lower courts will repeatedly be confronted with disputes over whether the appropriate notice was given under ERISA's specific requirements (see p. 10, n. 6, *supra*) years afterwards, when a benefit claim is denied.

In some circumstances, of which *Lorance* is an instance, there is tension between the statutory policy of repose and fairness to claimants who were not on notice at the time of the challenged act or omission that they would be adversely affected thereby. See *id.*, 109 S.Ct. at 2270-71 (Marshall, J., dissenting). But this is not such a case, since respondent was on notice from at least 1973 that by continuing to receive pension benefits he would be unable to accrue additional eligibility. Indeed, here and in like cases, the equities strongly favor the Trust because allowing a claimant to make his choice long after the fact relieves him of the risk, borne by other beneficiaries and critical to the actuarial evaluation of the Trust, that he will not work or live long enough to achieve eligibility. See p. 6, *supra*.

CONCLUSION

For the above-stated reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Counsel of Record)
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Dated: August 4, 1989

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2901

JUAN RODRIGUEZ; MARIA A. RODRIGUEZ,
Plaintiffs-Appellants,

versus

MEBA PENSION TRUST;
LUCILLE HART, Administrator,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Paul V. Niemeyer, District Judge
(CA-87-3430-PN)

Argued: January 9, 1989 Decided: April 7, 1989

Before ERVIN, Chief Judge, and WINTER and WILKINSON, Circuit Judges.

Amy Loeserman Klein (William E. Cohen, Marc A. Bernstein, SHORT, KLEIN & KARAS, P.C. on brief) for Appellants. Joseph Edward Kolick, Jr. (Angelo V. Arcadipane, Marcus C. Migliore, DICKSTEIN, SHAPIRO & MORIN on brief) for Appellees.

WILKINSON, Circuit Judge:

This case involves a challenge under the Employment Retirement Income Security Act (ERISA) 29 U.S.C. § 1001 *et seq.*, to defendant trust's determination to deny pension benefits to plaintiffs. The district court found it lacked ERISA jurisdiction and, alternatively, that defendant had acted properly in denying benefits. We disagree on both grounds and reverse.

I.

Plaintiff Juan Rodriguez is a retired marine engineer who became a member of the Maritime Engineer Beneficial Association (MEBA) in 1944. Upon retirement in 1965, he began receiving a monthly pension in the amount of $300, subject to periodic increases. He has continued to receive this pension since 1965.

In 1967, plaintiff began employment as a port engineer for Sea-Land Service, Inc. Sea-Land entered into a collective bargaining agreement with MEBA in June, 1968. In response to an inquiry from plaintiff, I. A. Lamy, vice-president of MEBA and trustee of the MEBA trust, informed plaintiff that he was required to apply for reinstatement to union membership but that such "[m]embership will not interfere with your pension."

Subsequently, on October 16, 1968, the MEBA pension trust regulations were amended and employees in plaintiff's position were offered the option of suspending their pension checks and accruing further benefits or continuing to receive pension checks but foregoing further ac-

cruals. Notice of this option was hand-delivered on November 25, 1969 to MEBA members who were affected by this new provision. Plaintiff never received such notification.

On December 18, 1972, plaintiff wrote Mildred Killough, then MEBA trust administrator, requesting a clarification of his status with the trust. Killough responded on March 1, 1973, informing plaintiff that he could have elected to have his pension benefits suspended under the 1968 option, thus accruing additional credits, but that since he elected to continue to receive pension benefits, he could accrue no further credits. For the next twelve years, although he corresponded with the trust on several occasions, plaintiff did not question his right to exercise the 1968 option.

On January 25, 1985, upon contemplating retirement from Sea-Land, plaintiff wrote the administrator of the MEBA trust requesting information on a lump sum payment of benefits. Frederick Jackson, pension trust manager, advised plaintiff that such a payment was not available because of his failure to suspend pension payments under the 1968 option. Plaintiff, through counsel, then requested a formal review of the denial of benefits.

The MEBA Pension Trust reviewed plaintiff's requests on three separate occasions and denied them each time. The denials were predicated upon plaintiff's failure to suspend his pension payments under the 1968 option. The trust did not dispute the fact that Rodriguez was at one time eligible to exercise the option.

On December 23, 1987, Juan and Maria Rodriguez filed suit under ERISA, challenging the MEBA trust's denial of their requested pension benefits. Plaintiffs moved for summary judgment on May 6, 1988, claiming that Juan Rodriguez did not receive notice of his option in 1968 or 1969, and that the decision to deny him the opportunity to exercise this option now was arbitrary and capricious. Defendants claimed that plaintiffs' ac-

tion was not cognizable under ERISA, that it was untimely under a variety of limitations theories, and that the trust's decision was proper because plaintiff failed to respond to the March, 1973 letter from Killough which notified him of the option.

The district court ruled for defendants. It concluded that ERISA did not apply to plaintiffs' claim; that plaintiffs' suit was barred by Maryland's statute of limitations which applied as a result of diversity jurisdiction; and that if the suit was timely, the trust's denial of benefits was proper. This appeal followed.

II.

ERISA is a comprehensive scheme of national scope designed to supplant diverse state regulation of private retirement plans. Accordingly, the Act supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). Recognizing, however, that it would be problematic to judge pre-ERISA conduct by post-ERISA standards, Congress provided that preemption of state law under § 1144(a) "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144 (b)(1). The application of ERISA thus depends upon: 1) a determination of the time the cause of action arose, and 2) a determination of the time of acts or omissions. *See Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 143-44 (3d Cir. 1985); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1500-1501 (9th Cir. 1984); *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838, 840 (1st Cir. 1981).

The district court concluded that plaintiffs met the first prong of the § 1144 test because their cause of action did not accrue until 1986 when the trustees formally denied benefits. The court failed to exercise ERISA

jurisdiction because it found "the critical acts or omissions" were omissions of notice in 1969 and the Killough letter of 1973. We hold, however, that ERISA jurisdiction is proper because both the cause of action and the operative acts or omissions occurred after January 1, 1975.

A.

The district court correctly recognized that the date of accrual of the cause of action would not defeat ERISA jurisdiction. An ERISA cause of action does not accrue until a claim of benefits has been made and formally denied. *Tanzillo*, 769 F.2d at 144; *Menhorn*, 738 F.2d at 1498; *Quinn*, 639 F.2d at 840; *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 361 (5th Cir. 1981). To hold otherwise would require lay participants and beneficiaries to be constantly alert for "errors or abuses that might give rise to a claim and start the statute of limitations running." *Menhorn*, 738 F.2d at 1501. It also would burden the judicial system with multiple and premature actions.

Plaintiff first made a claim for benefits in 1985, one year before his retirement. The MEBA trustees correspondingly did not formally deny him pension benefits until February, 1986. Thus, plaintiffs' cause of action did not accrue until 1986.

B.

The timing of the critical acts or omissions is also no bar to ERISA jurisdiction in this case. In *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977), this court held that where an employee had retired, filed his claim for benefits, and had benefits denied pre-ERISA, the mere filing of a post-ERISA suit did not establish jurisdiction under § 1144. We have not yet considered, however, whether ERISA applies where a plaintiff's application for pension benefits is made and denied post-ERISA,

but at least some acts occur pre-ERISA, as in this case.

Among the circuits to consider this issue, two competing views have evolved. The Third Circuit regards the trustees' act in denying a pension application as an act or omission which is subject to ERISA. *Tanzillo*, 769 F.2d at 144. *See also Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230, 1234 (7th Cir. 1982) (denial of pension benefits post-ERISA was sufficient to invoke ERISA, even though employee had retired years before ERISA); *Reiherzer v. Shannon*, 581 F.2d 1266, 1268-69 (7th Cir. 1978). By contrast, the First and Ninth Circuits have held that if the trustees' denial is the "inevitable result of unequivocal pre-effective date interpretations" of the plan, then the denial is not reviewable. *Menhorn*, 738 F.2d at 1501; *Quinn*, 639 F.2d at 841.

We adopt the Third Circuit view. While a claim determination may require the plan's trustees to consider pre-ERISA acts, the act of denying a pension post-ERISA will invariably involve a "contemporaneous construction of the plan's provisions . . . to which ERISA's fiduciary standards apply." *Tanzillo*, 769 F.2d at 144. Such a view fosters the congressional intent "to extend the protections of ERISA . . . as soon as practicable," *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307, 313 (8th Cir. 1979), so as to "provid[e] . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). It also promotes Congress' intention that exceptions to ERISA's preemption provisions be narrowly construed. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("preemption provisions of ERISA are deliberately expansive"). Further, the Third Circuit approach has the advantage of certainty. Courts need only look to the date of the trustees' determination to decide whether ERISA applies. Finally, equitable considerations support this standard. Plan participants cannot be expected to inquire about benefits until retirement. Because plan

trustees will not act on a participant's claim until it is made, their act of denying a claim will inevitably involve a post-ERISA interpretation of the plan.

Here the MEBA trustees did not deny plaintiff's claim until February, 1986, over ten years after ERISA's effective date. In so doing they engaged in a contemporaneous construction of the plan's provisions. Plaintiffs may therefore contest the trust's actions under ERISA and face no time bar under state law.[1]

III.

The district court held, in the alternative, that the MEBA trust's decision to deny plaintiffs' benefits was justified. It rejected the contention that the 1973 correspondence from Killough failed to notify plaintiff of his options. It also denied plaintiff's assertion that he was treated differently from similarly situated beneficiaries because other beneficiaries "contacted the Pension Trust, both soon after they learned of the option or many years in advance of retirement." We hold, however, that the trustees did fail to adequately notify plaintiff of his option and that plaintiff must now be afforded the opportunity to exercise it.[2]

---

[1] Under the district court's view, plaintiffs' state claims accrued in 1973 when Rodriguez received the letter from Killough informing him that he had failed to make an election of benefits in 1968. Hence, the state claims were held to be time barred.

ERISA provides no explicit limitations period for private causes of action. Under ERISA, plaintiffs' various claims are governed by Maryland's three year limitations period for breach of contract, *see Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987), and 29 U.S.C. § 1113. Plaintiffs' claims accrued in 1986 with the trustees' denial of benefits. *Tanzillo*, 769 F.2d at 144; *Menhorn*, 738 F.2d at 1498; *Quinn*, 639 F.2d at 840. Thus they are not time barred.

[2] The Supreme Court's decision in *Firestone Tire and Rubber Company v. Bruch*, —— U.S. ——, 109 S.Ct. 948 (1989), held

In a series of pre-ERISA cases under §§ 301 and 302 of the Labor Management Relations Act, courts held that pension plan participants must receive adequate notice of changes requiring their affirmative action and an opportunity to act in response to such notice. *See, e.g., Valle v. Joint Plumbing Industry Bd.*, 623 F.2d 196, 202-04 (2d Cir. 1980); *Norton v. I.A.M. National Pension Fund*, 553 F.2d 1352, 1359 (D.C. Cir. 1977) (arbitrary and capricious for trustees to cancel service credits when plaintiff not afforded "adequate chance" to comply with new requirements); *Burroughs v. Board of Trustees of the Pension Trust Fund for Operating Engineers*, 542 F.2d 1128, 1131 (9th Cir. 1976) (arbitrary and capricious to apply break-in-employment rule to employees "who had no notice of its existence and hence no reasonable opportunity to protect themselves from its impact"). ERISA then codified the standards of fiduciary conduct which these courts found to govern the plan/participant relationship. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981) ("ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet").

In ERISA, Congress set out to

> protect . . . participants in employee benefit plans and their beneficiaries, *by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto*, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (emphasis added).

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that the determinations of plan trustees on benefit eligibility were subject to de novo review absent a plan provision for the exercise of trustee discretion. The deficiency of the trustees' conduct in the instant case, however, is not dependent upon the nature of the plan or the standard of review applied thereto.

ERISA provides specific disclosure requirements in 29 U.S.C. § 1022(a)(1) which require plan participants and beneficiaries to be apprised of any "material modification in the terms of the plan." *See also* 29 U.S.C. § 1024 (b)(1). Likewise, the broad fiduciary duties imposed on the plan trustees are to be exercised "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104.

Courts have interpreted these provisions to require notice to plan participants of changes in a plan's provisions and an opportunity after such notice for the participant to take action. *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185-86 (3d Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984); *Kaszuk v. Bakery and Confectionery Union*, 638 F. Supp. 365, 369-70 (N.D. Ill. 1984), *aff'd in relevant part*, 791 F.2d 548 (7th Cir. 1986); *Chambless v. Masters, Mates & Pilots Pension Plan*, 602 F. Supp. 904, 909-10 (S.D.N.Y. 1984), *aff'd*, 772 F.2d 1032 (2d Cir. 1985); *Hillis v. Waukesha Title Co., Inc.*, 576 F. Supp. 1103, 1107-08 (E.D. Wisc. 1983). Plan participants should not lose pension benefits through mistakes and misunderstandings. "Congress promulgated the fiduciary duty and other provisions of ERISA, . . . to ensure that plan participants would receive *effective* notice of any plan changes that might affect their pension rights. . . ." *Kaszuk*, 638 F. Supp. at 371 (emphasis in original); H.R. Rep. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4646. Application of an overriding fiduciary standard of fairness was Congress' goal because it was "grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, . . ." S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4834, 4847. *See also Hillis*, 576 F. Supp. at 1107.

Here plaintiff did not receive fair notice of his option. As the district court found, the 1969 letter, intended to

notify re-employed pensioners of their options, was never even delivered to plaintiff. When Rodriguez wrote the trust in 1972 to inquire if he was eligible to receive additional benefits, administrator Killough responded that because he had failed to suspend his benefits pursuant to the 1968 option, "he could accrue no further credits." Thus, plaintiff only learned of his option in 1973 when he was told it was unavailable because he did not elect it in 1968. Subsequently, during 1975 and 1976, the MEBA trust gave two other port engineers a new opportunity to suspend their pensions and accrue further benefits because they had never been informed of their option. It never, however, notified plaintiff that its 1973 advice was incorrect and that he now could make his election, although a MEBA trust file identified plaintiff as a similarly situated individual. While the MEBA trust faults Rodriguez for failure to pursue his claim, it was the fiduciary's duty to afford him a fair opportunity to do so, not the beneficiary's duty to figure out the fiduciary's mistakes.

We cannot accept the district court's view that no duty of notification existed because this case did not involve " 'retroactive application' of a change in a pension plan provision which would work to cancel rights which were about to or had already vested. . . ." The retroactive application of a change in a plan provision is not the sole criterion for deciding whether the obligation to give reasonable notice was fulfilled. Indeed, the cases often address a trustee's failure to notify plan participants of opportunities to avail themselves of added benefits in the future. *See Genter*, 776 F.2d at 1185 (no notice of opportunity to increase insurance benefits); *Kaszuk*, 638 F. Supp. at 370-71 (no notice of election of new preretirement spousal benefits).

Finally, we reject the trust's assertion that the doctrine of laches bars plaintiffs' claim, because plaintiff knew of his option in 1973 and did not contest it until

1985. It makes little sense for the trustees to claim plaintiff sat on his rights when the same trustees told plaintiff he had no such rights to exercise. Plaintiff was informed in 1973 that his option was unavailable. As such, he had no reason to raise the issue again until retirement.

As Rodriguez never received adequate notice of his option, we reverse the judgment of the district court and remand with instructions to afford him the choice of accepting his present pension benefits or the benefits that would have accrued had the option been exercised, offset by payments already received. We leave to the district court the precise calculation of the amount of any offset, including the time-value of pension payments made to Rodriguez.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2901

JUAN RODRIGUEZ; MARIA A. RODRIGUEZ,
Plaintiffs-Appellants

v.

MEBA PENSION TRUST; LUCILLE HART, Administrator,
Defendants-Appellees

Appeal from the United States District Court
for the District of Maryland, at Baltimore

JUDGMENT

[Filed April 7, 1989]

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, at Baltimore, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

/s/ John M. Greacen
Clerk

APPENDIX B

CROSS MOTIONS
FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Docket No. PN-87-3430

JUAN RODRIGUEZ

and

MARIA A. RODRIGUEZ,

Plaintiffs

v.

MEBA PENSION TRUST

and

LUCILLE HART, ADMINISTRATOR,

Defendants

Baltimore, Maryland
August 3, 1988

The above-entitled matter came on for hearing before the Honorable Paul V. Niemeyer at 10:00 a.m.

APPEARANCES

On behalf of the plaintiffs:
Amy Loesermar Klein, Esquire
Marc A. Bernstein, Esquire

On behalf of the defendants:
Joseph E. Kolick, Jr., Esquire
Marcus Migliore, Esquire

ORAL OPINION

THE COURT: This is not an easy case. It has complex questions of law and equities that conflict, but I am prepared to make a ruling.

Plaintiff Juan Rodriguez is a retired marine engineer. He originally became a member of the Maritime Engineers Beneficial Association (the MEBA), a labor organization representing licensed seamen, in 1944. He retired in 1965 and applied for and was granted a monthly pension in the amount of $300 per month effective May 1, 1965. He has continued to receive these monthly payments since then and currently receives $390.66 per month. He has received more than $95,000 to date.

Plaintiff then returned to his native Puerto Rico and in 1967 took a job as a port engineer for Sea-Land. On June 16, 1968, Sea-Land entered into a collective bargaining agreement with the MEBA, of which the plaintiff had been a member, and plaintiff's employment then came under the union contract. Plaintiff wrote to MEBA to question his status in the organization and was told, "Membership will not interfere with your Pension."

Subsequently, on October 16, 1968, the MEBA Pension Trust Regulations were amended and employees in plaintiff's position—that is, returning to employment covered by the Trust as a result of MEBA organization of their positions and drawing a pension while continuing to work as a member of the MEBA—were offered the option of either suspending their pension checks and accruing further benefits or continuing to receive pension checks but foregoing further accruals. The plaintiff never received a notice of this option, which was sent to other MEBA members by way of a letter dated November 25, 1969. This letter was hand-delivered and called for a written response.

On December 18, 1972, plaintiff wrote to Millard E. Killough, Administrator of the MEBA Pension Trust at

that time, with several questions. He stated, among others, "I would like to clarify my status . . . I would like to know if I am eligible to receive further pension benefits in addition to those I am receiving now on the basis of my present employment."

Ms. Killough responded on March 1, 1973 by stating, ". . . on June 16, 1968, you could have elected to have your pension benefits suspended, in which case you could have accrued additional credits. Since you did not so elect, you continued to receive pension benefits and, accordingly, you could accrue no further credits."

A copy of the Trust Agreement, including the change giving that option, was included with the letter. No other formal notice of the option was ever sent to him. Rodriguez did admit that he was advised in late 1970s about Mr. Castano's change to exercise the option. Plaintiff never questioned the fact stated in the letter that he had made the election and never sought to make a change until his planned retirement in recent years.

Plaintiff had other correspondence with the MEBA Pension Trust over the years, but he never questioned his right to exercise the option described above.

On January 25, 1985, when plaintiff was contemplating retirement, he wrote to Lucille Hart, the Administrator then of the Trust, requesting information on a lump sum, rather than monthly, payment of benefits.

On February 26, 1985, he received a response from Frederick Jackson, Pension Trust Manager, advising him that this option was not open to him, again based on his failure to opt to suspend his pension payments in June of 1968.

Plaintiff then, through his attorneys, requested and received formal review of his denial of benefits. He requested that he be allowed to repay the pension payments that he had received since 1965 and thus become eligible

for the full amount of benefits he would have received had he not received the monthly benefits over approximately twenty years. He also requested a lump sum rather than monthly payments.

The MEBA Pension Trust reviewed plaintiff's request on three separate occasions and each time denied both of plaintiff's requests. The denials were predicated upon plaintiff's failure to opt to suspend his pension payments in June of 1968 when Sea-Land employees became part of MEBA.

Mr. Rodriguez and his wife have sued and have moved for summary judgment, seeking the full amount of the benefits, after returning monthly benefits received over the past twenty years, in a lump sum without payment of interest on the money that they have received over these years. They claim that Rodriguez did not receive notice of his option, that the option, in fact, did not even exist in June of 1968, (the Court would note that it really did not come into effect until October of 1968) and that the decision to deny him the opportunity to exercise this option now is arbitrary and capricious in comparison with the Trust's decisions regarding other beneficiaries.

Defendants MEBA Pension Trust and Lucille Hart, its current Administrator, have refused plaintiffs' request and seek summary judgment on the grounds that plaintiffs' action is not cognizable under ERISA, that it is untimely under a variety of limitations theories, and that the decision was not arbitrary and capricious because Rodriguez, unlike other beneficiaries, failed to make his requests prior to the time he retired. Defendants consider the March 1973 letter from Killough to Rodriguez to be notice of the pension option.

First, I will address the jurisdictional question.

Rodriguez retired and began receiving benefits for first time in 1965. He enquired about his pension bene-

fits based on his second period of employment in 1973. This suit was not filed until 1987. The defendants contend that plaintiffs' claim is barred for one of three reasons: (1) the cause of action either accrued or is based on acts or omissions which occurred prior to the effective date of ERISA; (2) the statute of limitations has run; and (3) laches.

Plaintiffs' claim is brought pursuant to the Employment Retirement Income Security Act, which we know as ERISA, 29 U.S.C. Sections 1001 *et seq.* Defendants contend that this Court lacks jurisdiction of this matter based on Section 1144 (b) (1) which states:

> This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

The defendants urge us to adopt the holdings of some courts that a cause of action arises under ERISA when there has been a repudiation by a fiduciary which is clear and is made known to the beneficiary. He addresses us to the *Miles* case decided in the Second Circuit and the *Valle* case, also decided in the Second Circuit, *Valle v. Joint Plumbing Industry Board.*

In the instant case, plaintiff wrote to defendant MEBA Pension Trust and asked, "I would like to know if I am eligible to receive further pension benefits." The defendant replied, ". . . you could accrue no further benefits." This language is obviously a repudiation and must have been clear to the plaintiff. But there was no formal Board rejection on that at that time.

In *Valle*, plaintiff applied for and was formally denied pension benefits by the pension plan's board of trustees prior to the effective date of the act, in January of 1975.

In *Miles*, although the plaintiffs had not applied for benefits, their employer requested that plaintiffs be accepted into the pension plan, and this request was also

formally rejected by the pension plan's broad of trustees prior to the effective date of the act, January 1, 1975.

In the instant case, there was no formal vote, decision or other action by the MEBA Pension Trustees with regard to plaintiff's pension benefits until 1985, long after the ERISA effective date.

Additionally, plaintiff's letter was not a formal application for benefits, but rather a request for information. He concluded his letter with, "Any information you can give me regarding my present situation will be appreciated." Many courts have held that a cause of action under ERISA does not accrue until a claim for benefits has been made and formally denied. In support of that, we cite the *Menhorn* case, out of the Ninth Circuit; the *Paris v. Profit Sharing Plan* case, out of the Fifth Circuit; and the *Quinn v. Country Club Soda* case, out of the First Circuit.

Since plaintiff's 1973 letter was a request for information, made long before he could have made a claim for benefits based on his second period of employment, and since no formal action was taken by the MEBA Trustees in 1973, the latter of the two rules that I have discussed above is applicable here.

The Court, therefore, concludes that the first prong of Setcion 1144 (b)(1) is not applicable. Plaintiffs' cause of action would not have accrued until his benefits were formally denied.

There is, however, a second clause to Section 1144 which we must also consider in order to determine the timeliness of plaintiff's claim and whether we have jurisdiction to decide this matter under ERISA. Under that second clause, plaintiffs' ERISA claim fails if it is based on "any act or omission which occurred before January 1, 1975."

Plaintiffs' claim here centers on the failure of the MEBA Pension Trust to properly inform Rodriguez of

his pension option in or around 1969 when other beneficiaries were notified, and on March 1, 1973, the Killough letter which informed him that his option no longer existed, in spite of the fact he had never been informed of the existence of the option in the first place. Indeed, plaintiffs' counsel confirmed at this hearing that if the notice had been given and the option exercised, the plaintiffs would not be here in court today.

The Court finds that these are the critical acts or omissions—the omission of notice in 1969 and the letter of 1973—and that the decision later by the Trustees denying the claim is not such an act or omission as was intended by the Act in the second prong under Section 1144.

Since these two events form the basis for the plaintiffs' claim and they occurred before January 1, 1975, even though plaintiff's cause of action arose after the effective date of ERISA because of the later denial by the Trustees, it is based on an act or omission which occurred prior to that date. For this reason, ERISA is inapplicable here and the Court lacks subject matter jurisdiction over the ERISA claim. The *Martin* case supports this, although the *Martin* case is somewhat distinguishable, and the *Menhorn* case, which I referred to above.

The plaintiffs contend, in the alternative, that this Court has diversity jurisdiction and that they have alleged sufficient facts in their complaint for this Court to so find. Plaintiffs have alleged in paragraphs 2 and 3 of the complaint that they are residents of Florida. They have alleged in paragraph 4 that defendant MEBA Pension Trust has a legal residence in Maryland. They have alleged in paragraph 5 that the defendant Lucille Hart is the Administrator of the Trust, but they have failed to allege that she is a citizen of a state other than Florida. Based on these allegations alone, we would be compelled to find that this Court lacks jurisdiction.

However, the failure to properly allege diversity of citizenship between the parties will not defeat the jurisdiction of the Court if such diversity does in fact exist. I will refer the parties to *Kelleam v. Maryland Casualty Company*, a Tenth Circuit case decided in 1940. The defendants have admitted on the record at the hearing on these motions that Ms. Hart is not a citizen of Florida but rather is a citizen of the state of Maryland, and apparently her deposition reflects this.

This Court, therefore, finds that diversity of citizenship exists as a matter of fact, thus giving it jurisdiction over the subject matter, and the complaint will be treated as so amended. *See Jones v. Freeman*, 400 F.2d 383 (8th Cir.), citing the earlier case of *Halsted v. Buster* from the United States Supreme Court.

Since the Court does not have jurisdiction under ERISA for the reasons given, this Court will look to state law which in this case amounts to a claim essentially for breach of contract. The referral to state law is suggested in the *Menhorn* case and in the *Quinn* case, which I have cited above. The Maryland statute of limitations for actions of this type is three years after the cause of action accrues. That is specified in the Maryland Courts and Judicial Proceedings Section 5-101. Under Maryland law, the "discovery rule" applies and the cause of action accrues when the plaintiff has knowledge of circumstances which would put an ordinarily prudent person on inquiry of facts which an investigation would have in all probability discovered if it had been properly pursued. *Poffenberger v. Risser*, 290 Md. 631, and *Sisters of Mercy v. Gaudreau, Inc.*, 47 Md. App. 372.

In this case, that occurred in 1973 when Rodriguez received the letter from Killough informing him that he had failed to make an election of benefits in 1968 and that he could, therefore, not accrue further benefits. His notice was reinforced when he was advised about a fellow em-

ployee's election at a subsequent time. Incidentally, when he received that letter in 1973, he did receive a full copy of the Trust Agreement. Since this action was filed more than ten years later, plaintiffs' claim is barred by the applicable statute of limitations.

Although we have decided this case and will grant the motion for summary judgment of the defendant and deny the motion for summary judgment of the plaintiff, had we decided this case under ERISA whether the Board of Trustees acted properly, we would have concluded as follows. I do this as a back-up finding to indicate to the parties where we would have gone on the merits.

Under ERISA the relevant question for our review of the decision of the Board of Trustees of the MEBA Pension Trust would be whether the decision was arbitrary and capricious. *Berry v. Ciba-Geigy* (4th Cir. 1985). Under this standard, we must show deference to the decision of the Trustees who have a daily and continuous administrative responsibility; we are not to conduct a *de novo* determination of whether their decision should have been different. Indeed, even if this Court were to disagree, it would have to apply the standards of arbitrary and capricious as set forth in that case.

The plaintiffs have cited no requirements in any of the regulations of the MEBA Pension Trust which delineate specific notice requirements, but rather have referred us to cases which have reversed trustees' decisions based on a failure to afford adequate notice to beneficiaries. Plaintiffs would have us reverse the Trustees' decision as arbitrary and capricious because they failed to give Rodriquez notice of and opportunity to exercise his Port Engineers Option.

The facts of this case, however, are distinguishable from those in the cases cited by the plaintiffs which would require us to reverse the Trustees' decision be-

cause Rodriquez knew in 1973, twelve years prior to his retirement, that a pension option in fact existed and that, as far as the MEBA Pension Trust was concerned, he had failed to exercise that option in 1968, and that he could not both continue to receive monthly pension payments and at the same time accrue further benefits.

This is not a case of "retroactive application" of a change in a pension plan provision which would work to cancel rights which were about to or had already vested as in *Norton v. I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir.) or *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir.).

The Trustees' decision here did not deny Rodriquez rights which were about to or had already vested. Although Rodriquez did not receive a fully accurate explanation of his option, he was clearly put on notice of the existence of the option and could have disagreed with the stated facts that he should have known. He also received a copy of the Trust Agreement. The Court, were it to rule on this issue, would not find that the Trustees' decision, in view of these facts, was arbitrary and capricious based on the lack of notice to Rodriquez and the passage of time.

Also, the plaintiffs contend that the decision of the Trustees to deny Rodriquez' request to repay his pension benefits and thus qualify for additional benefits was arbitrary and capricious because the Trustees reached a different decision with regard to other beneficiaries in similar situations. Defendants, however, have offered evidence which distinguishes Rodriquez from the other beneficiaries. These other beneficiaries contacted the Pension Trust, both soon after they learned of the option or many years in advance of retirement.

Rodriquez seems to want to have his cake and eat it, too, in this case. At the time he would have been exercising his option, the decision to forego current pension

benefits was not so clear. It was a bet that he would not survive for a sufficient period of time to receive greater benefits by exercising the option. Now, at this point in time, he seeks to recompute the benefits in his favor with hindsight, since he has in fact survived this period of time and is about to retire. This situation was distinguishable from those of the other beneficiaries, and for this reason, this Court finds that the decision of the Trustees did have a rational and sound basis and was not arbitrary and capricious.

For all of the foregoing reasons, I will be entering a separate Order which denies the plaintiffs' motion for summary judgment and grants the defendants' motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PN-87-3430

JUAN RODRIGUEZ, *et al.*

v.

MEBA PENSION TRUST, *et al.*

ORDER

For the reasons given orally at the hearing on August 3, 1988, it is hereby ORDERED this 3rd day of August, 1988, by the United States District Court for the District of Maryland, that:

1. The motion of plaintiffs for summary judgment is DENIED;

2. The motion of defendants for summary judgment is GRANTED; and

3. The Clerk of the Court is directed to mail a copy of this Order to all counsel of record.

/s/ Paul V. Niemeyer
PAUL V. NIEMEYER
United States District Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-1007

MEBA PENSION TRUST, *et al.*,
Petitioners

v.

JUAN RODRIQUEZ, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 5, 1989

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 16th day of June, 1989

No. 89-206

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MEBA PENSION TRUST, *et al.*,
Petitioners

v.

JUAN RODRIGUEZ, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the act or omission jurisdictional requirement of § 514(b)(1) of ERISA satisfied by the Trustees' first interpretation of their Trust Plan denying the application for pension benefits of a recently-retired employee, when that interpretation was rendered in 1986 and based on many factors occurring after January 1, 1975?

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IN THE

Supreme Court of the United States

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No. 89-206

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Juan Rodriguez first went to sea in 1935 at the age of 20. He became a member of the Marine Engineers' Beneficial Association ("MEBA") in 1944. He retired from sea duty on May 1, 1965, whereupon, under MEBA Trust Regulations, he was entitled to a pension of $300.00 per month. After retirement, Rodriguez returned to his native Puerto Rico and, following some non-marine employment, took a job as a Port Engineer for Sea-Land Service, Inc. in 1967. At that time Port Engineers were not covered by any MEBA contract. Rodriguez was covered by Sea-Land's pension program for non-unionized employees. On June 16, 1968, Sea-Land concluded a collective bargaining agreement with MEBA as a result of

which Rodriguez's employment became unionized. Rodriguez received a letter dated August 30, 1968 from I. A. Lamy who was both Vice President of MEBA *and* a Trustee of the MEBA Trust. The letter instructed Rodriguez to apply for union membership. Rodriguez immediately wrote to Lamy on September 2, 1968, informing him that he was drawing a pension as a retired sea engineer and stating that this fact "raised a question in my mind as to what is my present status in the organization." By letter dated September 5, 1968, Lamy informed Rodriguez that he was nevertheless required to apply for reinstatement to union membership but that such "[m]embership will not interfere with your pension." The Lamy letter informed Rodriguez of *no* option to suspend his current pension checks in order to accrue further pension benefits.

The next month, on October 16, 1968, the MEBA Trust Regulations were amended for the purpose of giving newly unionized port engineers who were on early retirement from sea duty an option of either (1) suspending their pension payments and accruing further pension credit or (2) continuing to receive their pension. This option was deemed so important that by letter dated November 25, 1969, MEBA Vice Presidents were directed by MEBA President Calhoon to *personally* deliver a copy of the option notice to each Port Engineer in his area who was so affected, explain it to each one, and receive each one's written determination.[1] The record showed there were 25 such Port Engineers. The option notice was itself dated November 25, 1969, was a letter under the signatures of a Union Vice President, and contained an explanation of the option. I. A. Lamy was the Vice President whose signature appears on the option notice

[1] Petitioners state (Pet., p. 4) that this notice was "sent to affected beneficiaries by letter"—indicating the mail was the method of delivery. The record shows and the Court below found that the method was hand delivery with explanation from a union Vice President (Pet., p. 3a).

delivered to Port Engineers on the Atlantic Coast. No letter was ever given to Rodriguez, probably because he lived in Puerto Rico.[2]

By letter dated August 3, 1972, Rodriguez received a letter from Mildred Killough, then MEBA Trust Administrator, notifying him of a change in the pension law allowing a member to elect to receive a smaller pension at retirement so that his spouse might continue to receive pension payments in the event of his death, *i.e.*, a survivor option. Since up to this point all information given Rodriguez was that the unionization of port engineers had no effect whatsoever on him, and he was not covered by the MEBA Plan, the notice elicited an immediate response from Rodriguez. By letter of December 18, 1972, he wrote to Killough:

> I would like to clarify my status and to learn if my present employer is making any contribution to a pension fund when I retire from my present position. I would like to know if I am eligible to receive further pension benefits in addition to those I am receiving now on the basis of my present employment.
>
> Is there any provision made for additional pension benefits and if so who is to make the contribution and how much would it cost. Any information you

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[2] Petitioners pretend that they concede Rodriguez's non-receipt in a show of good sportsmanship—giving him "the benefit of the doubt and assum[ing] that his assertion was correct." (P. 4, n.2 and see also p. 27.) In fact, the finding of non-receipt did not depend solely or even primarily upon Rodriguez's statements. The discovery process revealed that the MEBA Trust kept (1) a file for each pensioner or participant, which had copies of *all* the correspondence between the Trust and the participant, and (2) a general "Port Engineer" file, which *also* kept copies of materials related to port engineers. Copies of the option letter to *each port engineer* on whom it was delivered, with each such engineer shown as an addressee, were found in each engineer's files. But *no* copy of the option letter with Rodriguez as an addressee was found in either Rodriguez's or the "Port Engineers'" file. Both courts below found as a fact that Rodriguez never received the notice. (Pet. 3a, 14a).

> can give me regarding my present situation will be appreciated.

By letter dated March 2, 1973, Killough responded. She said:

> As of June 16, 1968, Sealand Service became a participating employer for its Port Engineers. With respect to pensioners employed as Port Engineers on the date a company becomes a participant in the MEBA Pension Trust for its Port Engineers, the Regulations provide [she then quoted then Articles II-A, §§ 14(D) and (A).]
>
> This means that on June 16, 1968, you could have elected to have your pension benefits suspended in which case you could have accrued additional credits. Since you did not so elect, you continued to receive pension benefits and, accordingly, you could accrue no further credits.

Killough sent Rodriguez a copy of the Trust Agreement with her letter.

On January 1, 1975, Rodriguez began work for a new employer Puerto Rico Marine Management, Inc. ("PRMMI"), having ended his employment with Sea-Land the day before. Later in 1975 Rodriguez received a copy of a letter from his new boss, Capt. James Murray, indicating that his new employer, PRMMI, was making pension contributions to the MEBA Trust on his behalf. This was the first time since 1967 that Rodriguez had knowledge that any current contributions were being made for him to the MEBA Trust. He contacted a MEBA "patrolman," *i.e.*, union representative, Danny Colon since Colon periodically visited Puerto Rico, and asked him to resolve the apparent contradiction between the 1973 Killough letter and the new information. Colon advised that he would contact the MEBA Trust office, but despite repeated requests by Rodriguez of Colon, no advices were forthcoming. In 1982, in conjunction with a medical checkup, Rodriguez visited the MEBA office and

inquired whether or not he could accrue further benefits. He was again told that he had waived his rights on June 16, 1968, (although, as discovered only after this suit was filed, these rights did not even exist in June, 1968). In 1982, Rodriguez was told that he could bring further "proof" to the MEBA Trust, but Rodriguez said he had no proof beyond the MEBA correspondence.[3]

Unknown to Rodriguez until discovery in this case, during the years 1975 and 1976, the MEBA Trust reached agreements with three other port engineers, two of whom, like Rodriguez, had never received notice of their option and the third had formally elected in 1969 *not* to suspend and accrue but subsequently asked to reverse that situation.[4] Both of the port engineers who had not received notice of their options were allowed to pay back past amounts and accrue credits based on past employment: the stated rationale for these Trust actions was that *these engineers had never received notice of the option.* On August 31, 1976, the MEBA Trust concluded a survey it had done on the subject of "Pensioners Who Either Were Working As Port Engineers At the Time The Contracts Were Signed For Such Engineers or Who Worked as Port Engineers Subsequent to the Signing of Such Contracts." In that survey, Rodriguez was listed as

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[3] Petitioners state that Rodriguez "corresponded with the Trust on several occasions" in the 12-year period 1973-1985 (Pet. p. 5). The District Court referred to correspondence "over the years" (Pet., p. 15a) and the Court below referred to "correspondence on several occasions" during that same period (Pet. 3a). In fact, the record indicated *no* correspondence between Rodriguez and the MEBA Trust during the 12-year period that elapsed from the 1973 Killough letter and the January 15, 1985 letter wherein Rodriguez informed the MEBA Trust as to his contemplated retirement.

[4] Petitioners represent (pp. 6-7, n.4) that Rodriguez had "notice" of one of these paybacks. Rodriguez had no official notice of any kind, but had hearsay information that a port engineer who had retired early had made some settlement; Rodriguez had no knowledge of any specifics.

a Port Engineer with the following notation: "remained on pension status (option not in file)." Despite their knowledge *in 1976* that Rodriguez had no option notice or option exercise in his file and their contemporaneous determinations to re-open the option opportunity for others who had not been notified, no effort was made by the Trust to repair the damage by (1) correcting the misinformation communicated to Rodriguez by Administrator Killough who had told him, after he had inquired about his rights, that his option had been waived; and (2) notifying him that he had an option and an opportunity to exercise it.

On January 25, 1985, after consulting attorneys, Rodriguez informed the MEBA Trust Administrator that he was intending to retire and inquired about his entitlements. In February, 1985, he was told once more by the Trust's Pension Trust manager that he had waived his rights in June 1968. Rodriguez's counsel made a formal request for review of an anticipated denial of pension benefits. This request was submitted by the Administrator to the MEBA Trust in two meetings, October 1985 and February 1986. It was considered along with the request of another Port Engineer, Frank Peel, who was also receiving a pension after retirement as a seagoing engineer. The Administrator packaged the Peel and Rodriguez requests, and in her reports to the Trust never informed them that Peel, but not Rodriguez, had been served with the notice of option, had exercised it, and had elected to keep receiving his pension check. She merely told them that the Trust "had no record of Mr. Rodriguez electing to suspend his pension benefit" and that Rodriguez never responded to the March 2, 1973 Killough letter.

On March 3, 1986, Rodriguez received notice that his application was again denied. The stated reason was the reason given by the 1973 Killough letter, *viz.*, "that on 'June 16, 1968 you could have elected to have your pen-

sion benefits suspended in which case you could have achieved additional credits. Since you did not so elect you continued to receive pension benefits. . . .'"

After counsel requested again that the Trust articulate its reasons for the refusal, and after being told that the first reason was Rodriguez's failure to exercise his option on June 16, 1968, and the second reason was Rodriguez's failure to answer the 1973 letter, Rodriguez's counsel petitioned the Trust for rehearing. The grounds for the rehearing petition were the failures of the Trust (1) to apply the Trust Regulations as written[5] and (2) to give Rodriguez notice of his option, including the Trust's *mistake* in asserting that Rodriguez had waived his rights on June 16, 1968 (when they never even existed). Rodriguez's Petition to the Trust for rehearing was denied.

Rodriguez filed suit in District Court challenging the Trust's denial of his pension. Both parties agreed that the case was appropriate for decision on cross motions for summary judgment. The District Court, after hearing oral argument, gave an oral decision from the bench. The court held it had no jurisdiction under ERISA to consider this action because Rodriguez failed to satisfy the "act or omission" requirement of 29 U.S.C. § 1144 (b)(1) (1985). While finding that the Trust made no formal decision until 1985, long after ERISA's effective date, and that consequently Rodriguez's cause of action accrued then, the District Court found that the "critical acts or omissions," for ERISA purposes, were the omission of notice in 1969 and the 1973 letter of Administrator Killough. (Pet. 19a). The court found diversity jurisdiction (Pet. 20a), and then found Rodriguez's claim time-

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[5] The Trustees never responded to this argument. Although it formed a significant part of Rodriguez's arguments in his Motion for Summary Judgment, the District Court never adverted to it. Because of its holding on the merits, the Court of Appeals never had to reach it. Thus this point has never been judicially considered.

barred under Maryland law (*Id.*). The District Court said that had it found ERISA jurisdiction, it would nevertheless have supported the Trustees' decision under the arbitrary and capricious standard because the 1973 Killough letter was notice to Rodriguez of his option and it was up to Rodriguez to challenge the Killough decision then (Pet. 22a-23a).

In a unanimous decision, the Court of Appeals reversed. The appellate court found that ERISA is a "comprehensive scheme of national scope designed to supplant diverse state regulation of approved retirement plans." (Pet. 4a). The court affirmed the lower court's finding that the cause of action did not accrue until 1985. It then held that the Trustees' *first* determination to deny Rodriguez his application was a critical act or omission which involved a contemporaneous construction of the plan's provisions (Pet. 6a-7a). The Court of Appeals found the Trust's failure to give Rodriguez notice of his option a clear violation of ERISA (Pet. 9a, 10a)—indeed a clear violation of the Trust's duties even prior to ERISA (Pet. pp. 7a-8a). In rejecting petitioner's basic argument that the fault lay with Rodriguez for not having sought to correct the mistakes of Administrator Killough at an earlier time (although Rodriguez then had no basis to even know that these were mistakes), the Court of Appeals succinctly said:

> "While the MEBA Trust faults Rodriguez for failure to pursue his claim it was the fiduciary's duty to afford him a fair opportunity to do so, not the beneficiary's duty to figure out the fiduciary's mistake." (Pet. 10a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THIS CASE DOES NOT PRESENT THE NARROW ISSUE IN WHICH THERE HAS BEEN A SPLIT IN THE CIRCUITS

A. The Narrow Issue Which Has Split The Circuits

There is a split in the Circuits on a very narrow issue: when an employee retires post-ERISA, applies for benefits post-ERISA, and that application is first denied post-ERISA, does such denial inevitably constitute an "act or omission" sufficient to satisfy the jurisdictional requisites of 29 U.S.C. § 1144(b)(1).[6] Prior to this case, the Third and Seventh Circuits had held that the first post-ERISA determination of a Trust was necessarily such an act or omission: *Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir. 1985); *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985); *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).[7] Prior to this case, the Fourth Circuit's decision in *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977), had left this issue open in that Circuit, because *Martin* involved pre-ERISA employment, retirement, application for benefits, and denial: the only post-ERISA act was the filing of suit.[8] Thus

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[6] 29 U.S.C. § 1144(b)(1) provides: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975."

[7] While the *Coward* case uses the words, and searches the facts of record for, "critical acts," the court there held that the "critical acts" are the denial by a Trust of an application for pension benefits (*see* 686 F.2d at 1234).

[8] In similar circumstances, the Second Circuit reached the same decision as the Fourth Circuit in *Martin*, holding that there is no ERISA jurisdiction where the applicant's employment ended pre-

with its decision in this case, the Fourth Circuit joins the Third and Seventh Circuits. Less than a week after *Rodriguez* was decided, the Fifth Circuit joined this group. *Degan v. Ford Motor Co.*, 869 F.2d 889, 894-95 (5th Cir. 1989).

The First and Ninth Circuits have carved out a very limited exception to the application of ERISA in circumstances of post-ERISA employment, application for benefits, and denial thereof. That exception, stated by the Ninth Circuit in *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984), is that when the *only* act during the ERISA period is the denial of the beneficiary's application, *and* when, as a result of acts or omissions occurring entirely before 1975, the trustees have *no discretion* to grant an application, ERISA does not apply:

> Cases such as the one at bar must be distinguished from those in which benefits have been denied as the result of a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date. A plan provision requiring discretion or interpretation does not work to deny an individual benefits until specifically applied to him. A denial of benefits pursuant to such a provision thus operates simultaneously as *both* the event triggering accrual of a cause of action *and* the substantial act resulting in denial of benefits. It would therefore not fall within either clause of § 1144(b)(1), and would under § 1144(a) be subject to ERISA.

Id. at 1502-3. The First Circuit has a similar rule, finding ERISA jurisdiction lacking where absolutely nothing

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ERISA. *La Montagne v. United Wire, Metal & Machine Pension Fund*, 869 F.2d 153 (2d Cir. 1989). The only distinction between *La Montagne* and *Martin* is that in the former, the applicant waited six years, *i.e.*, into the ERISA period, before filing for benefits. In both cases, *all* the employment facts were pre-ERISA.

apart from denial of the beneficiary's application happened during the ERISA period and the trustees' decision was "but the inexorable consequences of acts and omissions taken long before." *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981).

B. The Issue Presented Here

This case does not present the narrow issue which has split the Circuits: *viz.*, does ERISA jurisdiction apply where a post-ERISA denial of benefits involves no discretion or plan interpretation, but is only the inexorable result of all pre-ERISA events? This case is almost the antithesis of that situation. Contrary to Petitioners' repeted characterizations of the 1973 letter as "the Trust's pre-ERISA acts and omissions" (Pet. 11, and see pp. 5, 7-8, 14), the Trust decided nothing in this case *until 1986*. Both the District Court and the Court of Appeals so found (Pet. 7a and 18a). Neither found that the Trust had no discretion to do otherwise: indeed, the Trust never even argued it lacked discretion to decide in favor of Rodriguez.

In this case, *almost every significant act or omission occurred post-ERISA*:

(1) in 1986, the Trust first interpreted its Regulations regarding failure to give notice to Rodriguez and the consequences thereof;

(2) in 1986, the Trust first interpreted its Regulations denying a pivotal Rodriguez argument, namely, that the plain language of the Trust Regulations required grant of the application;

(3) in 1986, the Trust first concocted two new rationales for denying Rodriguez the right to exercise his option over and above the 1973 Administrator's "waiver" rationale—*viz.*, that it was Rodriguez's (a) failure to challenge the 1973 Killough letter, and (b) acceptance of checks during the 1968-1985 period that caused the denial of his

claim. The new rationales (and the facts on which the latter was based) are post-ERISA;

(4) in 1982, officials of the Trust again misinformed Rodriguez, telling him he had waived his rights by failing to exercise his option in June, 1968;

(5) in 1975 and 1976, the Trust permitted two other engineers in Rodriguez's situation to exercise their option, but neglected to initiate the same accommodation for Rodriguez, although it had knowledge that he had inquired about his rights and that Killough had misinformed him. The Court of Appeals found these acts significant (Pet. 10a).

(6) in 1976, the Trust conducted a survey on the very question at issue; located Rodriguez as an engineer who had no option on file; and still failed to give him an opportunity to exercise his option.

This case does not call into issue the narrow *Menhorn/Quinn* exception, and this case raises none of the issues for which this Court's intervention is allegedly sought.

C. Other Non-Issues

Contrary to the Petition (p. 8), the Court of Appeals did not hold "that Federal Courts have jurisdiction to judge pre-ERISA conduct under the standards established by ERISA." What the Court below did hold is that an employee who works 10 years into the ERISA period; whose employer made contributions on his behalf all during that period; who retires in 1985; and whose pension application is decided in 1986 is entitled to have that denial judged under the standards of ERISA, notwithstanding the fact that the Trust initially gave as its reasons for denial their own Administrator's pre-ERISA misinformation. Contrary to the Petition (Pet. 8), the holding below is neither in direct conflict with decisions of the First and Ninth Circuits nor inconsistent with the clear language of the statute. While the Court below de-

clined to carve out the exception created by the First and Ninth Circuits, it would not matter in this case if it had: the Trust had total discretion in 1986, and for the 11 ERISA years that preceded it, to give Rodriguez notice of his option and an opportunity to exercise it. Contrary to the Petition, the decision below has absolutely nothing to do with the jurisdictional issue discussed at length (pp. 11-13) as to whether or not § 302(c)(5) of the Labor Management Relations Act can provide an independent basis of jurisdiction in this case. While §§ 301 and 302 were cited by petitioner as an alternative basis for jurisdiction *if* ERISA jurisdiction were lacking, the decision below found ERISA jurisdiction intact. The court below discussed these sections not to provide additional jurisdictional support, but merely to show that its decision that a pension plan is required to give its participants a full and fair opportunity to exercise options which affect significant changes in their rights existed pre-ERISA under decisions interpreting §§ 301 and 302 of the LMRA (Pet. 9a).

Thus this is not a case in which post-ERISA standards are applied to pre-ERISA conduct in any way, shape, or form. While there may be many interesting issues lurking in this entire field, none are presented by this case.

II. THIS SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The "act or omission" issue, discussed *ante*, has been referred to as the "second prong" of the ERISA jurisdictional test. The first prong that must be satisfied is the date of accrual of the cause of action. Virtually every ERISA case which has considered this issue, including those on which Petitioners otherwise rely, has come to the same conclusion: a cause of action accrues under 29 U.S.C. § 1144(b)(1) when a pension application is denied. *E.g., Menhorn v. Firestone Tire & Rubber Co.*,

738 F.2d 1496 (9th Cir. 1984); *Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981); *Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir. 1985); *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985); *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977); *Damron v. Sinai Hospital*, 815 F.2d 975 (4th Cir. 1987); *Degan v. Ford Motor Co.*, 869 F.2d 889, 894-95 (5th Cir. 1989); *Paris v. Profit Sharing Plan*, 637 F.2d 357 (5th Cir. 1981), *cert. denied*, 454 U.S. 836 (1981).[9] The Court below so held as did the District Court (Pet. 5a, and 18a).

The rationale for the rule was most cogently stated in the *Paris* case (637 F.2d at 361):

> We agree that a cause of action does not become a presently enforceable demand until a claim is denied. To hold otherwise "would put an almost intolerable burden on employees covered by pension plans. It would require individuals who are unversed in the law to be constantly vigilant. . . . Moreover, claims filed before a pension actually has been denied might be challenged for lack of ripeness. *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947). Requiring piecemeal challenges before an actual denial has occurred would also result in a great waste of judicial resources" *Morgan v. Laborers Pension Trust Fund*, 433 F. Supp. 518, 522 n.5 (N.D. Cal. 1977). We hold that for purposes of ERISA a cause of action does not accrue until an application is denied.

Without citation to any of these uniform authorities, Petitioners attack this rule as contrary to this Court's

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[9] The only exception to the application of this rule which we have found is *Turner v. Retirement Plan*, 659 F. Supp. 534 (N.D. Ohio 1987), a decision which neither distinguished nor even acknowledged the plentiful authority to the contrary.

holdings regarding "stale claim[s] based on a time-barred violation" (Pet. 15) in respect of unfair labor practices and discrimination claims. The question presented, according to Petitioners (Pet. (i)), is:

> May a court sustain a claim for benefits under ERISA where the validity of that claim (asserted within the statute of limitations period) necessarily depends on a determination that an act or omission *outside the limitations period* was illegal? (emphasis in original).

The statement of the issue and the "analogies" presented betray the argument's utter lack of cogency. There was no determination of an "illegal" pre-ERISA act or omission, no violation of a federal statute, nor anything remotely similar. In 1969, a letter that should have been delivered was not. In 1973, a letter that should not have been written was. Although these acts and omissions were found to constitute fiduciary mistakes, they were not held to be "illegal" in any sense. No court—certainly not the District Court—said the Administrator's 1973 letter was "illegal." The analogy of which Petitioners speak, and the question they pose, is not even remotely in the ballpark.

III. THE RULE ENUNCIATED BY THE COURT BELOW IS THE MAJORITY RULE AND IS CORRECT

Even if, *arguendo*, this case turned on application of the First and Ninth Circuits' exception, which it does not, the rule enunciated by the Third, Fourth, Fifth, and Seventh Circuits is clearly the better rule.[10] The pain-

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[10] We note *Menhorn* was a 2-1 decision, with a strong dissent on the ERISA jurisdictional holding. By contrast, *Jameson*, *Tanzillo*, *Reiheizer*, *Coward*, *Degan*, and *Rodriguez* were all unanimous opinions on the jurisdictional issue.

The Eighth Circuit's decisions, *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979), and *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), basically

staking investigation into whether, or to what extent, Trustees' post-ERISA denials are based on pre-ERISA events serves only to create confusion and uncertainty in the field of pension rights and obligations, and raises the host of jurisdictional issues with which the District Court grappled when it determined that the "act or omission" criterion was not satisfied here. As the Court below held, its rule has the advantages of certainty and equity (Pet. 6a). It is 1989, 14 years into ERISA.[11] Both the court below and the *Degan* court were correct in holding that their view of ERISA jurisdiction conforms to Congressional purposes.

IV. THIS CASE WAS CORRECTLY DECIDED

Rodriguez is currently receiving a pension of $390.66 per month. If he were to be credited for all of the time he has worked since his job became unionized for which *employers were making contributions on his behalf*, he would be entitled to a pension of over $3,000 per month. The sole basis on which this pension was denied to him by the Trust was his failure to exercise an option of which he had never been given notice.

The Trust has never denied that it had an obligation to give Rodriguez notice of his option. The Trust argued

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apply the same rule as that enunciated by the Third, Fourth, Fifth and Seventh Circuits but reach the result by a different path. These cases interpret § 514(b)(1) of ERISA as permitting the court to apply state law to pre-ERISA conduct when both pre- and post-ERISA conduct is involved, and when such application would be most fair. Neither cited case suggests that federal court jurisdiction is defeated merely because significant or critical pre-ERISA conduct is also involved. *Winer*, 593 F.2d at 313-14; *Landro*, 625 F.2d at 1351-1352.

[11] The rule need not apply where *all* employment facts are pre-ERISA, and the only thing that occurs in the ERISA time period is the filing of an application. Indeed, the Fourth Circuit in *Martin*, *supra*, p. 9, and the Second Circuit in *La Montagne*, *supra*, pp. 9-10 and n.8 showed that it would not.

below that the letter informing Rodriguez that he had forever waived his rights constituted such notice. This disingenuous position was soundly rejected by the Court below. Here, the Trust sounds a variation of this theme: that Rodriguez seeks an edge by making his election at a time when all risk runs in his favor. The short answer to this argument is that Rodriguez tried to accrue further credits in *1973*, but Killough's misinformation would not let him. Another answer is that the Trust had full opportunity to afford Rodriguez that option in 1976, when they did so for other employees and knew he fell into the same classification, again at a time long in advance of Rodriguez's retirement, and when all risks did not run in his favor.

The Trust's 1986 determination that Rodriguez had forever waived his rights to exercise the option contained in the Plan Document by not challenging the Killough letter in 1973 was the most significant possible "act" of the Trust under § 514(b)(1), and was made post-ERISA. The Court of Appeals decision was correct.

CONCLUSION

The Petition for Certiorari of MEBA Pension Trust, *et al.* should be denied for the above stated reasons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MEBA PENSION TRUST, *et al.*
Petitioners,

v.

JUAN RODRIGUEZ, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT [1]

I. The Intercircuit Conflict As To The Applicability Of ERISA

A. Given the Fourth Circuit's express acknowledgment that its construction of § 514(b)(1), 29 U.S.C. § 1144(b)(1), of ERISA is in direct conflict with the construction placed on that provision by the First and Ninth Circuits (A. 6), it is not surprising that Respondents' Brief in Opposition attempts to recast the lower court's holding. Respondents assert that this case does not present the is-

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[1] Throughout this Reply, "Pet." will refer to the Petition for a Writ of Certiorari. "A." will refer to the Appendix to the Petition, and "Resp. Br." will refer to the Respondents' Brief in Opposition.

sue on which the Circuits have split—whether a district court may assert jurisdiction under ERISA and apply ERISA's substantive stnadards to adjudicate a claim based on a post-ERISA denial of benefits where that claim is the "inevitable result of unequivocal pre-effective date interpretations." A. 6, quoting *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir. 1984), and *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981).

Respondents contend that this case is unlike *Menhorn* and *Quinn* in that "[i]n this case, *almost every significant act or omission occurred post-ERISA*" and list six post-ERISA events which they view as "significant." Resp. Br. 11, emphasis in original. Respondents' theory is wholly incompatible with the Court of Appeals' explanation of its decision to assert ERISA jurisdiction, notwithstanding § 514. A. 5-7. The Court did not distinguish *Menhorn* and *Quinn*, or even advert to the passage in *Menhorn* which Respondent quotes. Rather, the Court recognized that those decisions represent one of "two competing views" (A. 6), of which the Court chose the opposing "approach" of the Third Circuit. *Id.* The *only* post-ERISA event relied upon by the Court of Appeals to assert jurisdiction is the denial of claimed benefits in 1986. This fact does not differentiate the present case from *Menhorn* and *Quinn*, which also involved post-ERISA benefit denials. The Court of Appeals reasoned that the "Third Circuit approach has the advantage of certainty [because courts] need only look to the date of the trustee's determination to decide whether ERISA applies" (*id.*), and further, that the "act of denying a claim will inevitably involve a post-ERISA interpretation of the plan" (A. 7). Respondents' contention (by thrice listing the 1986 denial) that jurisdiction attached *because of the grounds stated* by the Trust is wholly inconsistent with the Court of Appeals' straightforward (though we submit erroneous) approach, and would introduce ambiguity whereas the Court sought "certainty."

The only other listed post-ERISA item which the Court mentioned is that in 1975 and 1976 two port engineers were given the opportunity to retroactively exercise their option. There is no basis for the assertion (Resp. Br. 12) that "[t]he Court of Appeals found these acts significant." On the contrary, the Court did not even mention them in its statement of the case (A. 2-4) or in its discussion of the jurisdictional issue. Again, that discussion would have been entirely different if it had been the Court's view that the events in 1975 and 1976 constitute an independent basis for liability.[2] Respondents' items (4) and (6) are not even referred to in the Court of Appeals' opinion.

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[2] Further evidence that these events were not deemed significant is that the Court of Appeals did not address the District Court's conclusion that the Trust properly differentiated those two individuals. As the District Court noted, Rodriguez' course of conduct is readily distinguishable from that followed by other beneficiaries who, like Rodriguez, did not receive notice of the option in 1969, because they sought to retroactively exercise their option "both soon after they learned of the option or many years in advance of retirement." A. 22. Rodriguez, by contrast, waited over twelve years to inform the Trust what he knew in 1973, *i.e.*, that he failed to receive the original notice of the option in 1969. As the District Court explained, it was this knowing delay in seeking a retroactive option that potentially would permit Rodriguez to have the best of both worlds:

> At the time he would have been exercising his option, the decision to forego current pension benefits was not so clear. It was a bet that he would not survive for a sufficient period of time to receive greater benefits by exercising the option. Now, at this point in time, he seeks to recompute the benefits in his favor with hindsight, since he has in fact survived this period of time and is about to retire. This situation was distinguishable from those of the other beneficiaries, and for this reason, this Court finds that the decision of the Trustees did have a rational and sound basis and was not arbitrary and capricious. [A. 22-23.]

B. In discussing the other aspect of the first question presented by the Petition, Respondents' distortion of the Court of Appeals' opinion is complete. They assert that "this is not a case in which post-ERISA standards are applied to pre-ERISA conduct in any way, shape, or form." Resp. Br. 13. This statement sweeps aside the Court of Appeals' reliance on the nondelivery of the 1969 letter to plaintiff and on the Trust's 1973 response to his inquiry as to whether he was eligible to receive additional benefits. A. 9-10. Moreover, Respondent provides no answer to the inevitable question: "If the Court of Appeals was not applying ERISA standards, what standards did it apply?" The Court plainly did not rely on pre-existing state law.[3] And while the Court's opinion creates uncertainties as to whether its discussion of § 302(c)(5) of the Taft-Hartley Act and decisions thereunder (A. 8) was used merely as an aid to interpret ERISA standards, or was treated as a separate basis for liability for pre-ERISA acts (Pet. 11), Respondents steadfastly disclaim that §§ 301 and 302 of the Taft-Hartley have anything to do with the case. Resp. Br. 13. They apparently take this tack in order to avoid acknowledging the conflict in the Circuits as to the meaning of § 302(c)(5). See Pet. 11-13.[4]

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[3] State law was mentioned by the Court of Appeals only in a footnote. A. 7 n.1. That discussion was limited to an acknowledgment that the District Court had dismissed Respondents' state law claims as time barred and a finding that the opposite conclusion should be reached with respect to Respondents' ERISA claims. *Id.*

[4] Respondents further obfuscate matters when they refer to "the jurisdictional issue discussed at length (pp. 11-13) as to whether or not § 302(c)(5) of the Labor Management Relations Act can provide an independent basis of jurisdiction in this case." Resp. Br. 13. As is entirely clear, the Petition was there addressing the question of substantive standards, rather than jurisdiction.

We note also that Respondents say, perhaps inadvertently, that "§§ 301 and 302 were cited by petitioner * * *." *Id.* These provisions were cited by plaintiffs (Respondents).

II. The Conflict With This Court's Limitations Decisions

1. Respondents also assert that the Fourth Circuit's conclusion that their claim is not time-barred does not merit review because that conclusion was based on a uniform construction of ERISA, *viz.*, that a cause of action for denial of benefits accrues upon formal denial of a benefit claim. Resp. Br. 13-14. This simply does not meet the issue raised in the Petition, pp. 15-18.

There is no doubt that, to the extent Respondents claim that the Trust's 1986 determination was improper because it rested on an erroneous construction of the Trust's regulations, their cause of action accrued upon the denial of benefits and the statute of limitations began to run on that date. That, however, is not the claim addressed by the Fourth Circuit, which found the 1986 determination to be in error *only* because it found an earlier event (the Trust's failure to give notice in 1969) to be improper. In that circumstance, the authorities set forth at pages 15-17 of the Petition establish that Respondents' claim is timely only if the earlier event is within the limitations period.

In this respect, the instant case is indistinguishable from *Machinists* v. *National Labor Relations Board*, 362 U.S. 411 (1960). In *Machinists*, an employee was discharged for failure to comply with a union security clause of a collective bargaining agreement. The Labor Board complained (on behalf of the employee) that the discharge was unlawful, not because of the language of the union security clause or the manner in which it was applied to him, but on the allegation that the clause had been illegally *adopted* outside the limitations period. Obviously, the employee's claim for wrongful discharge did not "accrue" until the time of his discharge. Nonetheless, this court reasoned that a discharge that was "otherwise lawful" could not be challenged on the basis of an earlier event "where a complaint based on that earlier event is

time-barred." *Id.* at 417. As Justice Harlan explained, a contrary holding "would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here." *Id.* at 425. So, too, under ERISA, if the statute of limitations does not begin to run until an employee's claim for benefits is rejected, even though validity of the claim depends on the legality of events outside the limitations period, claims based on earlier events (such as alleged failures to provide notice) would continue to have legal consequences long after the event. Respondents do not even attempt to reconcile this result with the policy of repose embodied in every statute of limitations. See Pet. 17-18.

Instead, Respondents recur to the basic theme of their argument, saying: "There was no determination of an 'illegal' pre-ERISA act or omission, no violation of a federal statute, nor anything remotely similar." Resp. Br. 15. According to Respondents, the 1969 failure to give notice, and the 1973 letter which stated that Rodriguez no longer had an option, "were found to constitute *fiduciary mistakes*, they were not held to be 'illegal' in any sense." *Id.*, emphasis added. Respondents' limitations problem cannot be evaded by this soft euphemism. Here, there can be no doubt that a complaint based on the Trust's failure to give notice in 1969 and/or its 1973 determination would be time barred. If the Court of Appeals' decision did not depend on a finding that one of the acts was illegal, there was no basis for its conclusion that the 1986 denial was not "otherwise lawful." *Machinists*, 362 U.S. at 417.[5]

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[5] Finally, Respondents suggest that this case was "correctly decided" because "[t]he Trust's 1986 determination that Rodriguez had forever waived his rights to exercise the option contained in the Plan Document by not challenging the Killough letter in 1973 was the most significant possible 'act' of the Trust under § 514(b)(1), and was made post-ERISA." Resp. Br. 17. The short answer to this contention is the same as to Respondents' other points—the rationale now provided by Respondents is not the

III. The Questions Presented Are Important

It bears emphasis that Respondents do not deny that the questions presented in the Petition are important to private pension plans which are covered by ERISA. See Pet. 13-14, 17-18.

IV. The Petition For Certiorari In No. 88-3012

There is presently pending before this Court a Petition for Certiorari, filed shortly before the Petition herein, in *Lamontagne* v. *Pension Plan of the United Wire, Metal & Machine Pension Fund, et al.*, which seeks review of the Second Circuit's decision (of the same title) reported at 869 F.2d 153 (2d Cir. 1989). In that decision, the Second Circuit followed *Menhorn*'s holding "that a district court lacks subject matter jurisdiction over a pension applicant's claim that his employer violated the fiduciary standards section of ERISA by denying his application, when the denial was merely the 'inexorable consequence' of pre-1975 events. 738 F.2d at 1502." 869 F.2d at 156.[6] Accordingly, the Court affirmed dismissal of *Lamontagne*'s post-ERISA claim that the denial of benefits to him, based on a break-in-service rule established prior to ERISA, violated ERISA's fiduciary standards. In No. 88-2012, the claimant seeks review of that holding. He asserts, *inter alia*, a conflict with the decision of the Fourth Circuit herein.[7]

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rationale offered by the Court of Appeals. The Fourth Circuit did not conclude that the Trust's decision was arbitrary or not in accord with Trust regulations, nor did it dispute the District Court's conclusion that Rodriguez' failure for twelve years (from receipt of the Trust's 1973 decision until the filing of his pension application in 1985) to inform the Trust that he had not exercised his option because he had never been informed of it was an attempt by him "to have his cake and eat it too," which provided the Trustees with "a rational and sound basis" for denying him relief.

[6] Candor compels us to acknowledge that we overlooked the *Lamontagne* decision at the time of filing the Petition herein.

[7] The question there presented reads as follows:

> Whether ERISA's fiduciary standards, which became effective on January 1, 1975, apply to all denials of benefits occur-

This conflict should be resolved now. It is, of course, very much a discretionary matter whether review should be granted in both of two pending cases and, if only one is chosen, which would be the more useful vehicle for the Court. We deem it inappropriate to comment on the grounds stated by the Respondents in No. 88-2012 why review should be denied there, although they do not deny that the decision in *Lamontagne* conflicts with the Fourth Circuit's decision in this case. We do note, however, that No. 88-2012 does not present the statute of limitations issue raised by the second question here. Review in this case would enable this Court to resolve in their entirety the problems arising from post-ERISA claims based on pre-ERISA conduct.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ring on or after that date, as held by the Third, Fourth, and Fifth Circuits, and as maintained by the United States Department of Labor or whether their applicability depends on a case by case analysis of the "significant facts" of each denial, as held by the First, Second, Seventh, Eighth and Ninth Circuits? [Petition for Certiorari, No. 88-2012, p. i.]

[8] See Brief in Opposition to the Petition for a Writ of Certiorari, etc., No. 88-2012 at p. 24, and n.12.